



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pynco, Inc.--Reconsideration

File: B-257853.2

Date: April 13, 1995

Dennis J. Riley, Esq., and Andrew B. Katz, Esq., Riley & Artabane, for the protester.
Mary G. Curcio, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration of decision denying protest is denied where protester makes arguments that it could have, but did not make during consideration of protest and otherwise does not demonstrate that the decision contains errors of fact or law.

DECISION

Pynco, Inc. requests reconsideration of our decision, Pynco, Inc., B-257853, Nov. 16, 1994, 94-2 CPD ¶ 190, in which we denied its protest against the terms of solicitation No. DAAH01-94-R-8032, issued by the Department of the Army for pitot-static test sets.

We deny the request for reconsideration.

The Army issued the solicitation for the test sets under the procedures governing two-step sealed bidding, with step one consisting of a letter request for bid samples in lieu of technical proposals. Pynco protested that the Army improperly required bid samples. According to Pynco, bid samples are only appropriate where the government requires design characteristics that cannot adequately be described in the specifications. Pynco asserted that the Army could use an existing Navy specification to procure the test sets. Pynco also complained that the time allowed for the submission of bid samples was inadequate.

Federal Acquisition Regulation § 14.202-(4)(c) permits agencies to request bid samples for products that must be suitable from the standpoint of facility of use, general feel, or other characteristics, because such characteristics cannot be described adequately in the specification. The Army asserted that it needed the bid samples because it

could not adequately describe certain required facility-of-use characteristics, including ease of calibration, maintainability (the arrangement and accessibility of components and printed circuit boards for ease of maintenance), application compatibility and human factors characteristics (testing the bid sample to determine if the design, location, and layout of control displays and maintenance accesses are compatible with the clothing and personal equipment worn by personnel using and maintaining the equipment). The Army argued that the Navy specification overstated its needs and was written for a different type of aircraft.

We found that the Army properly required bid samples because it could not adequately describe the human factors/facility-of-use characteristics it required and because its needs were different from and less stringent than the Navy's. We also concluded that the record did not support Pynco's contention that the 82 days permitted by the Army to submit bid samples was insufficient. We pointed out in any case that since the agency stated it urgently needed the test sets, even if the 82 days permitted for samples did restrict competition, it would not be improper. Pynco requests reconsideration of our decision.

Our Office will reconsider a decision where the requesting party demonstrates that the decision contains errors of fact or law. 4 C.F.R. § 21.12 (1995). Pynco's request does not meet this standard.

In its request for reconsideration, Pynco argues that our decision is erroneous because we failed to recognize that the Army had no need for bid samples since the Navy test set specification met the Army's needs. According to Pynco, it demonstrated in its protest comments and supplemental comments that the Navy specification adequately described the facility-of-use requirements for the Army's purposes. In addition, Pynco asserts that we never considered that the Army did not explain why it could not relax the Navy's specification or delete the unnecessary requirements to meet its needs and that we erroneously accepted the Army's contention that its test set requirements were very different from those of the Navy.

First, while Pynco now argues otherwise, in its comments and supplemental comments Pynco did not demonstrate that the Navy specification was adequate for the Army's needs. Pynco states that it made such a demonstration on pages 5 and 6 of

its protest comments and page 4 of its supplemental protest comments. In relevant part, pages 5 and 6 of Pynco's comments merely stated:

"The Army also states it could not use the Navy mil-spec . . . because the Navy mil-spec overstated the Army's needs. . . . How could the Army not define its needs through a written specification when another agency took the time to develop such a detailed specification that it overstated the Army's needs. Clearly all the Army had to do to develop a suitable specification was relax some of the Navy mil-spec requirements so that the resulting specification adequately defined what the Army wanted."

In its supplemental comments, in relevant part, Pynco stated: "the FOU items [facility of use characteristics] are described in the Navy specification." As we explained in our original decision, neither of these statements demonstrated that the Navy's human factors/facility-of-use characteristics were sufficient to meet the Army's needs, despite Pynco's access to the Navy specification and the Army's statement of its facility-of-use needs.

Second, it is not true that the Army failed to explain why it could not relax the Navy specification to meet its needs. The Army specifically explained that it could not relax the Navy's specification because the Army required a commercial test set while the Navy's specification described a military test set which was to be used for different types of aircraft. Pynco did not refute this argument, but instead simply asserted that the Army could relax the Navy's specification. While Pynco now asserts that the Army's needs are not different from the Navy's and that the test sets required are the same, this is an argument that Pynco could have, but did not make, during the initial protest. Accordingly, we will not consider it now. International Health Management Corp.--Recon., B-254468.2, Sept. 24, 1993, 93-2 CPD ¶ 183.

Pynco also challenges our conclusion that the time permitted for bid samples was adequate. In denying Pynco's contention that the 82 days permitted by the Army was insufficient, we found that while only one offeror responded to the solicitation, before the Army released the solicitation at least four potential offerors indicated to the Army that they could comply with the agency's requirements. It was not until after Pynco's protest was filed that any offeror indicated that the bid sample could not be produced in the required time, and then only because of individual business circumstances. Specifically, one offeror, Command Electronics, stated that it was currently producing the test

set and was filling orders on a first come/first served basis and therefore did not have samples available. Command Electronics requested permission to submit its literature for review. A few days before bid samples were due, a second offeror, Laversab, requested additional time in which to submit its bid sample because its sheet metal contractor failed to supply needed materials. We therefore found no indication in the record that the time allowed to submit bid samples was not sufficient. In a footnote, we recognized that during the protest a representative of Laversab submitted an affidavit in which he stated that Laversab would not have been able to submit a bid sample because of the time, money, and effort involved in doing so. We did not give any weight to this statement because, as late as a few days before the bid samples were due, Laversab requested additional time to supply bid samples because of the failure of its sheet metal contractor to provide needed supplies. We pointed out that, in any case, since the agency stated it urgently needed the test sets, even if the 82 days permitted for samples did restrict competition, it would not be improper.

Pynco argues that we improperly failed to give any weight to the Laversab affidavit. According to Pynco, Laversab never expressed its concern with the time allowed for the submission of bid samples because the Army misled Laversab into believing it would have sufficient time to submit a bid sample. Laversab, however, never expressed this concern to the Army but instead, as noted, as late as July, explained to the Army that it needed more time simply because its sheet metal contractor did not supply needed material. Accordingly, we properly accorded no weight to the Laversab affidavit, since it was not consistent with the firm's previous explanation and it was submitted after the protest was filed.

Pynco also asserts that we erroneously stated that Command Electronics could have submitted an offer because the record included information which indicated that firm would have needed to modify its test set significantly to meet the specification. However, Command Electronics sent the Army a letter in which it stated that it was currently producing the test set required by the Army. We had no reason to question this statement and Pynco provided us with none. Accordingly, we understood and still understand that Command Electronics was capable of supplying bid samples but declined to do so because of other business commitments.

Finally, Pynco argues that the Army misrepresented the urgency of the requirement. Since Pynco could have raised this argument during the initial protest, but did not, we will not consider it now. International Health Management Corp.--Recon., supra.

The request for reconsideration is denied.

Ronald Berger
for Robert P. Murphy
General Counsel